No. 83-1011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JON OLSON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION BY THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the Court of Appeals of Georgia properly concluded that the Petitioner did not have a reasonable expectation of privacy in the area where marijuana was first discovered.

2.

Whether Petitioner's postarrest statements were properly admitted at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes cited:

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PART ONE

STATEMENT OF THE CASE

Petitioner, Jon Olson, was indicted on January 4, 1982, for trafficking in marijuana in violation of O.C.G.A. § 16-13-31(c). A motion to suppress was filed on behalf of the

Petitioner prior to trial requesting that marijuana seized from various areas be suppressed and that his statements be suppressed. A hearing was held on the motion to suppress on February 4, 1982. At the conclusion of that hearing, the trial court granted the motion in part and denied the motion in part. The motion was granted insofar as evidence seized from the search of the van was suppressed and insofar as evidence seized from Petitioner's house, which was designated as house "A," was suppressed. The court ruled that the marijuana found in the shed and the marijuana that was growing were found after c nsent was obtained; therefore, the motion was denied as to that material. The court also denied the

motion insofar as the evidence which was found in house "B" and as to what was found in the yard under the plastic cover. A written order was entered setting forth these findings.

Subsequently, a trial was held on the charges beginning on March 10, 1982. After a verdict of guilty was entered, Petitioner was sentenced to twenty years imprisonment, plus a fine of $25,000 on March 11, 1982. (R. 65).

Petitioner subsequently filed an appeal to the Court of Appeals of Georgia challenging the conviction in the instant case. On appeal, that court addressed numerous issues, including the denial of the motion to suppress and the admission of Petitioner's statements. The court affirmed the trial court's judgment as

to these issues, but directed that the sentence be reduced under Georgia law. Olson v. State, 166 Ga. App. 104, ___ S.E. ___ (1983). Motions for rehearing were filed on behalf of the Petitioner and on behalf of the State. The motions were both denied.

Petitioner subsequently filed a petition for a writ of certiorari in the Supreme Court of Georgia. Although said petition was initially granted, the court subsequently concluded that the petition did not satisfy the criteria for the grant of certiorari and the writ was vacated on November 2, 1983. The instant petition was then filed with this Court.

STATEMENT OF THE FACTS

The evidence presented at trial showed that two police officers, Chief Boddie and Officer Cox of the Palmetto, Georgia police department received information from an informant that there were three fields of marijuana growing in Coweta County, Georgia. The two officers, accompanied by the informant, entered a large wooded tract off of an interstate highway and came upon a pump and pipe which had been described by the informant. Following the pipe, they came upon a house which appeared to be abandoned. The officers testified that they had seen no "no trespassing" signs nor had they seen any fence. They did testify that the next day an overgrown, pushed down

fence was noted. The testimony of Petitioner was to the contrary at the hearing on the motion to suppress.

At the abandoned house, which is referred to as "house B," Officer Cox found a large stash of marijuana and reported it to Chief Boddie. Investigator Ronnie Thompson of the Coweta County Sheriff's Department met with Officer Boddie near another road leading to the tract and received the information. At this point Officer Cox, who had been left at the scene, reported that a vehicle was leaving the area. Subsequently, Petitioner was stopped in his van.

Upon meeting Investigator Thompson, Petitioner began to tell him that someone was growing marijuana on the land and he wanted to "make a

deal." (T. 126, 159). He mentioned legal counsel at the scene and the conversation was halted by the officer. Petitioner later that day and the next day repeatedly asked to talk to Investigator Thompson and continued to offer to "make a deal" for the "man in Atlanta" and was repeatedly read the Miranda warnings. The officers secured a search warrant and, accompanied by the Petitioner, discovered an extensive marijuana farm. Petitioner claimed that he had been held incommunicado by the Sheriff's office, but this was disputed by the witnesses produced by the State at the Jackson v. Denno hearing. The trial court concluded that the statements were constitutionally valid and allowed them to be admitted.

The Court of Appeals of Georgia made certain factual findings in addressing the record. That Court concluded the following:

> On September 3, 1981, Officers Boddie and Cox of the Palmetto City Police Department received a tip that three fields of marijuana were growing on appellant's property, a 400-acre tract in Coweta County. The officers and the informer proceeded to an apparently abandoned house located on appellant's property. Boddie testified that they crossed a portion of appellant's property

before reaching the house, but that he was not sure at the time where Appellant's property line was located and that he saw no signs or fences demarking the property.

Upon their arrival at the abandoned house, Cox located a large amount of suspected marijuana lying under a plastic sheet in the front yard. Boddie left Cox at the scene and met Officer Thompson of the Coweta County Sheriff's Department near a gated, dirt road entering the property. While positioned near the gate, Boddie and Thompson received a radio message from Cox indicating that some unidentified

vehicles had pulled up to the abandoned house, that an unidentified person had moved the suspected marijuana, and that the vehicles were leaving the house. Within two to four minutes, two vehicles, including the van being driven by appellant, reached the gate at which Thompson and Boddie were located. Thompson halted the van, spoke with appellant, and shortly thereafter arrested appellant. A search of the van revealed a large quantity of marijuana. Appellant was taken to the Coweta County Jail where he was detained throughout the night of September 3.

After arresting appellant, Thompson obtained a search warrant for appellant's property. A search of the abandoned house and appellant's residence, located approximately one-half mile from the abandoned house, revealed additional marijuana located in both structures.

On September 4, 1981, Thompson, accompanied by appellant, again searched the premises. Appellant led Thompson to three separate marijuana fields, each of which was well hidden behind

plum thickets. Thompson confiscated the marijuana growing in two of the fields. Appellant also led Thompson to a large quantity of marijuana stored in five barrels within a shed near the abandoned house.

Olson v. State, supra, 166 Ga. App. 104.

As noted previously, the trial court granted the motion to suppress as to the marijuana found in the Petitioner's residence, house "A", and the vehicle, but denied the motion as to the marijuana obtained pursuant to the warrant from the abandoned house, the shed near the house and from the fields.

Further facts will be developed as necessary for a more thorough examination of the issues presented by the instant petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS FIRST DISCOVERED.

Petitioner has urged this Court to grant the instant petition for a writ of certiorari based on the failure of the trial court to suppress certain evidence. The basis for this request by the Petitioner is an assertion that the decision by this Court in Katz v.

United States, 398 U.S. 347 (1967), narrowed the scope of the open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1924). Petitioner asserts that his intent to exclude the public was manifested by a wire fence surrounding the property, fifty to one hundred "no trespassing" signs and an access road blocked by a gate. Petitioner has asserted that the Court of Appeals of Georgia adopted a per se approach to the open fields doctrine which was incapatible with Katz, supra. Petitioner also cites to three cases presently pending before this Court which he asserts should affect the decision in the instant case. See Maine v. Thornton, ___ U.S. ___, 103 S.Ct. 1520 (1983); Oliver v. United States, ___

U.S. ___, 103 S.Ct. 812 (1983); Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982).

Respondent submits that there exists no reason for granting certiorari in the instant case as the Court of Appeals properly applied the open fields doctrine in light of the facts of the instant case. The factual findings made in the instant case clearly distinguish this case from other cases in that the facts do not show a reasonable expectation of privacy on the part of the Petitioner.

In examining the search in question, it is necessary to examine the various areas that were searched and the bases for the searches. The abandoned house, house "B", was searched pursuant to a search warrant,

the probable cause for this search being gleaned partially from the information obtained by Chief Boddie and Officer Cox. In order to examine the warrant, it is thus necessary to examine their initial entry onto the property. Respondent asserts that their entry and discovery of the evidence was proper under the open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1924). In that opinion, this Court noted that "the special protection accorded by the Fourth Amendment to the people in their persons, houses, papers and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Id. at 59.

Subsequent to the decision in Hester, this Court entered the opinion in Katz v. United States, supra. In that case, this Court noted that the Fourth Amendment protects people and not places. In meeting the requirements under Katz, it must be established that a defendant exhibited an actual subjective expectation of privacy and that the expectation of privacy is one that society is prepared to recognize as reasonable. Katz v. United States, supra at 362.

The Fifth Circuit Court of Appeals upheld the continued use of the open fielde doctrine in United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978). The court stated, "although the expectations test has done away with outmoded property concepts no

longer satisfactory for fourth amendment analysis [cites omitted] the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations." Id. at 453. The court went on to note that it would still hold that open fields surrounding a house would not be protected under the Fourth Amendment.

In examining the situation in the instant case in light of a determination as to whether certiorari should be granted, this Court should examine the facts of this case and the applicability of the open fields doctrine to those facts. In the instant case, the trial court as a finder of fact obviously found the

facts such that the search of house "B" would be upheld. As noted by the Court of Appeals of Georgia, "the uninhabited house in question was located on a tract of land containing an inhabited house. However, the two houses were approximately one-half mile apart, and one could not be seen from the other." Olson v. State, supra. The court went on to note, "in the present case, the record amply supports the findings that the abandoned house and its surrounding property were not part of the curtilage of appellant's residence." Id. Therefore, the court concluded that the sighting of the marijuana under the plastic cover in the yard of the abandoned house was authorized under the open fields doctrine.

In examining Petitioner's allegation that he had a reasonable expectation of privacy in the area around the abandoned house, the Court of Appeals found the following facts:

> . . . the officers testified that they did not see any "no trespassing" signs or fences blocking their entry onto the property. According to Boddie's testimony at the motion to suppress hearing, "[t]he officers received no notice prior to their entry that the owner or rightful occupant forbade such entry." [cite omitted]. Consequently, despite conflicting evidence, the trial court was authorized in

concluding the facts demonstrated that appellant had no reasonable expectation of privacy in the area where the marijuana was first discovered. [cites omitted].

Olson v. State, supra.

The facts presented at the hearing on the motion to suppress further allowed the court to conclude that the only fence about the property was overgrown and pushed down and was not even noticed by the officers until the next day. Thus, the facts of this case clearly indicate that the officers received no notice which would give them any idea that the Petitioner had closed this particular portion of his property to the public. The facts also clearly

substantiate a finding that house "B" was abandoned. It was described as being weatherbeaten and an older looking house. The officers also testified that there were no signs of life about the house. Investigator Thompson did not observe any power lines or telephone lines going to the house and only found a piece of a chair for furniture inside the house. There, all the credible testimony revealed that house "B" was abandoned.

Based on all the above evidence, Respondent asserts that the Court of Appeals of Georgia correctly concluded that Petitioner had no reasonable expectation of privacy in the abandoned house and to the fields in that area. Therefore, the open fields doctrine was properly applied in the

instant case. Even if the decision by this Court in Katz v. United States, supra, narrowed the open fields doctrine, the search was proper because any expectation of privacy that the Petitioner may have had was not reasonable.

The cases cited by the Petitioner which this Court previously stated that it will hear, are sufficiently distinguishable from the facts of the instant case for this Court to conclude that a granting of certiorari is not warranted in the present case. As each case must turn on its unique facts, it is necessary to examine the underlying factual circumstances behind each case involved.

This Court has granted certiorari in Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982). The factual circumstances in that case involve a forced entry by deputies on to eighteen hundred acres of land which were clearly fenced, locked, occupied and posted. The Florida courts noted that the deputies had to cross a dike, ram through a gate and cut a chain lock as well as cross several posted fences in order to reach the area in question. See State v. Brady, 379 So.2d 1294 (Fla. App. 1980). The Florida District Court of Appeals excluded the evidence based on the total encirclement of the property and the "no trespassing" signs that were present. The court concluded that

there was clearly an expectation that no one would enter the property.

The Florida Supreme Court also concluded that the search was improper based on the facts of that particular case. The court concluded that there was a clearly demonstrated expectation of privacy and found that under the facts of that case it was reasonable. State v. Brady, 406 So.2d 1093 (Fla. 1981). Therefore, that case presents a circumstance factually distinguishable from the instant case in which the factual finding was clearly made that no reasonable expectation of privacy existed. Unlike the case in State v. Brady, supra, the instant case involves a situation in which officers stated they did not see any "no trespassing"

signs and indicated that they did not see a fence on the first day, but only saw a broken down and overgrown fence on the second day. Therefore, the facts in this case do not justify a finding that the expectation of privacy was reasonable.

This Court has also granted certiorari in Maine v. Thornton, ___ U.S. ___, 103 S.Ct. 1520 (1983). That case involves a situation in which officers walked across the defendant's property between a mobile home and the adjacent house. The officers followed a woods road which was being used as a footpath. The marijuana was found growing in a clearing surrounded by chicken wire. It was noted that the area was heavily wooded. The court noted that there had been an old stone

wall surrounding the area, an old barbed wire fence and "no trespassing" signs around the perimeter of the property, including the area where the woods road entered the defendant's property. The court based its decision on the fact that there was a secluded location and there were many efforts made to exclude the public. The court found that these facts evidenced a reasonable expectation of privacy. The court specifically based its decision on factual findings and the fact that the trial court even concluded that the officers went part way up the defendant's driveway. State v. Thornton, 453 A.2d 489 (Me. 1982). Again, the circumstances in that case were factually distinguishable from the instant

case. The court in that case was faced with a question of a reasonable expectation of privacy and whether the open fields doctrine would extend to those cases. Such facts are simply not present in the instant case.

The third case cited by the Petitioner is Oliver v. United States, ___ U.S. ___, 103 S.Ct. 812 (1983). In that case, detectives drove past the defendant's residence for approximately three quarters of a mile to a barn. At that point, the detectives were mistaken for hunters and were specifically advised to leave the premises. The officers ignored the warning and continued across the property. There was a private road blocked bya locked gate with a "no trespassing" sign posted on the gate.

This was the fourth such sign that had been seen by the officers while crossing the farm. The two officers then slipped through a hole in the gate and continued on foot for another quarter of a mile across the farm. United States v. Oliver, 657 F.2d 85 (6th Cir. 1981). In that case, the panel of the Sixth Circuit initially concluded that the expectation of privacy was objectively reasonable based on the facts of the case.

Subsequently, the Sixth Circuit Court of Appeals considered the case en banc. That court examined the facts of the case in light of Katz v. United States, supra. The court found the general principles of the Fourth Amendment did not protect an open field of marijuana. The court

concluded that it would protect a person in an open field or a house built there, but not the field itself. Therefore, the en banc decision concluded that there was no Fourth Amendment violation. United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc). That case rests solely on the facts of the case and the en banc court's apparent conclusion that no facts would serve to find a reasonable expectation of privacy in an open field. No such conclusion was reached by the Georgia Court of Appeals in the instant case. The Georgia court specifically concluded that there was no reasonable expectation of privacy in this case. Therefore, Respondent submits that the case of United States v. Oliver is not

similar to the present case and does not justify the granting of the petition for a writ of certiorari.

Respondent submits that the open fields doctrine set forth by this Court in Hester v. United States is still viable even in light of Katz v. United States. Even if this Court were to determine that the open fields doctrine should be narrowed in its scope, no reason exists to grant certiorari in the instant case as the Court of Appeals of the State of Georgia did apply a narrowed approach to the question by utilizing the "reasonable expectation of privacy" test set forth in Katz v. United States. As the Court of Appeals correctly applied the decisions of this Court, no federal constitutional

issue exists which would justify the granting of the writ of certiorari.

B. PETITIONER'S STATEMENT WAS PROPERLY ADMITTED AT TRIAL.

Petitioner asserts that his arrest was illegal, asserting that the initial warrantless entry onto his property was impermissible and also challenges the warrantless search of his van. Petitioner asserts that either one of these two factors makes his arrest illegal and, therefore, should preclude the admission of his statements. Petitioner also asserts that he asked to speak to his attorney at the time and was held incommunicato.

Respondent asserts that the record clearly supports a finding that the

arrest was proper. Investigator Thompson met with Chief Boddie after Chief Boddie and Officer Cox had observed the marijuana at the abandoned house, house "B". This is the same marijuana which Respondent has previously shown was properly admitted. Thus, Investigator Thompson was aware of the facts Boddie had observed. Thompson was familiar with the area and with the Petitioner, whom he believed to be the owner of the property. Thompson knew of Boddie's information and of his observing marijuana on the premises. Thompson knew that Petitioner was the owner or occupant of the premises and also knew where the driveway providing access to the property was situated. Once Officer Cox radioed that a vehicle was

coming out, Officer Thompson stopped Petitioner in his van. Based on this information, Respondent asserts that Officer Thompson clearly had probable cause to arrest the person leaving the premises in the van because he had every reason to believe that that person possessed marijuana or was involved in dealing with the marijuana. The only finding by the trial court was that there was no probable cause to believe that there was any actual contraband in the van at that time.

Officer Thompson testified that he advised the Petitioner of the Miranda warnings at that time and on several other occasions. No promises or threats were made, Petitioner was allowed to use the bathroom and was

not denied food and water. Petitioner did not ask to make a telephone call until the next day according to the testimony of Officer Thompson. Based on these factual findings, the trial court concluded that the statements were properly admitted.

The initial statements made by Petitioner were not the result of any interrogation. Once the Petitioner was stopped and Officer Thompson identified himself, the Petitioner began to talk about marijuana being grown on his property and his desire to "make a deal." Once Thompson asked if the Petitioner wanted him to find the marijuana Petitioner was referring to, Petitioner said that he might need to get legal advice at that time. Officer Thompson immediately stopped-

the conversation and read the Petitioner the Miranda warnings. According to Officer Thompson, Petitioner later kept insisting that he wanted to talk before they left the scene. (T. 127). When they returned to the Sheriff's office, Petitioner again said he wanted to talk to Officer Thompson and was again advised of his rights. From these facts it is clear that Petitioner himself initiated the conversation, rather than any statements being made as a result of an interrogation.

This Court has addressed the admissibility of confessions as follows:

> The question of whether a confession is the product of a free will ...der Wong Sun

must be answered on the facts of each case . . . . The Miranda warnings are an important factor, to be sure, in determining whether the confession was obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, [cit.] And, particularly, the purpose and flagrancy of the official misconduct are all relevant. [Cit.] The voluntariness of the statement is a threshold requirement. [Cit.] and the

> burden of showing admissibilty rests . . . on the prosecution.

Brown v. Illinois, 422 U.S. 590, 603 (1975).

Therefore, even if the arrest is deemed to be illegal, and Respondent asserts that it clearly is not, other factors must be considered before determining if the Petitioner's statements were properly admitted. The Court of Appeals of Georgia concluded that it was bound by the findings of credibility made by the trial court. In making such a statement, the court noted that the evidence produced at the Jackson v. Denno hearing supported the following conclusions concerning the arrest and statement made by the Petitioner.

Two to four minutes after receiving word from Cox that vehicles were leaving the scene of the abandoned house with suspected marijuana, Thompson stopped Appellant's van at a gated, dirt road leading from the property. Thompson told appellant, whom he knew personally to be the owner of the property, to get out of the van. He identified himself and explained his presence on appellant's property. Appellant then stated that he suspected marijuana was growing on his property and that he wanted to make a deal

for information concerning the person who was responsible for the marijuana. Thompson then requested permission to search appellant's property at which time appellant stated that he would like legal advice or counsel. Thompson then read appellant his Miranda warnings, which appellant acknowledged and understood. Appellant was then placed under arrest and taken to the Sheriff's office, where he requested to talk to Thompson. After again receiving Miranda warnings, appellant informed Thompson that "people in

Atlanta" were growing marijuana on his property. Appellant stated that he had helped harvest some marijuana and helped move it into the abandoned house. Thompson and the appellant discussed the "men in Atlanta bringing the marijuana and looking for a place to bury the marijuana" and appellant made reference to marijuana being grown behind the house.

Thompson obtained the search warrant. Appellant remained in detention the night of September 3. The next day appellant again received Miranda warnings and agreed to walk Thompson

around the property. During the tour of the property, appellant lead Thompson to three marijuana fields and five barrles of marijuana stored in the shed adjacent to the abandoned house.

Olson v. State, supra at 76-77.

Based on these facts, the Court of Appeals of Georgia concluded that, even if the arrest were not proper, the trial court was authorized to include that the statements and actions were voluntary and were purged of any taint of any alleged illegal arrest. Brown v. Illinois, 422 U.S. 590. In Rawlings v. Kentucky, 448 U.S. 98, 106-110 (1980), this Court upheld the admissibilty of a statement even though it was made at at a time

when a defendant was being illegally detained. The opinion of this court emphasized certain specific factors in reaching this conclusion. The court emphasized the fact that Miranda warnings were given moments before the statement, that the defendant was detained in a congenial atmosphere, the statement apparently was a spontaneous reaction to the discovery of drugs, the statement was clearly voluntary, and the absence of purposeful and flagrant misconduct on the part of the detaining officers. The evidence in the instant case supports a finding that each of these same five factors were present.

Respondent submits that the conclusion by the Court of Appeals of Georgia and the trial court "that the

admission of the statements did not abridge Appellant's consititutional rights, as they were made freely and voluntarily and constituted acts of free will unaffected by any alleged illegality in the detention of Appellant" is clearly supported by the record in this case. Olson v. State, supra. Based on that conclusion, the Court of Appeals simply noted that it was not necessary to reach the question of the legality of the arrest.

Respondent asserts that the facts in the instant case clearly support a finding of probable cause to arrest the Petitioner at the time said arrest was made. The officers knew marijuana was growing on the property and the officer in question knew that the Petitioner owned the property. These

petition for a writ of certiorari filed on behalf of the Petitioner, Jon Olson.

Respectfully submitted,

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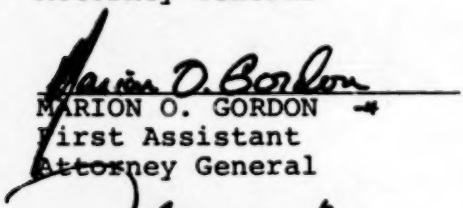

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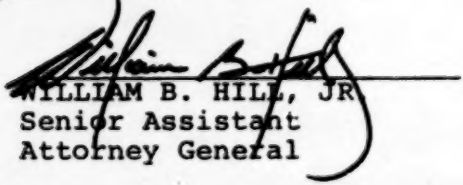

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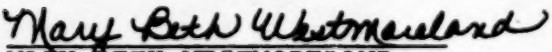

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This 24th day of January, 1984.

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facts, coupled with the fact that Petitioner was leaving that property, was sufficient to conclude that there was probable cause to arrest Petitioner. Furthermore, even if the arrest were impermissible, there was sufficient facts present to purge any taint that may have existed. Therefore, no federal constitutional issue is presented which would justify this Court in granting a petition for a writ of certiorari.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the

CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States

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